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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF NEVADA**

DENNIS MONTGOMERY, an individual; and
MONTGOMERY FAMILY TRUST, a California
Trust,

Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, L.L.C., a Nevada
Limited Liability Company; WARREN TREPP,
an individual; DEPARTMENT OF DEFENSE of
the UNITED STATES OF AMERICA; and
DOES 1 through 10,

Defendants.

AND RELATED CASE(S)

Case No. 3:06-CV-00056-PMP-VPC
Base File

3:06-CV-00145-PMP-VPC

REPLY IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE

Pursuant to this Court's Order of May 29, 2008, eTreppid hereby files its Reply in Support of
Motion for Order to Show Cause.

This Reply is supported by the Following Points and Authorities:
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I. INTRODUCTION

After having failed, for several months, to make any effort to produce, or even collect, documents in response to eTreppid's discovery requests – even in the face of multiple court orders requiring production – Montgomery now seeks to avoid further discovery sanctions by asserting that (1) he is unable to produce responsive documents because of limitations imposed by the United States Protective Order; (2) he has already provided responsive documents; (3) he is unable to provide responsive documents because they are in the possession of his former counsel, or (4) he is unable to provide responsive documents because he has misplaced them.

Montgomery's excuses for failing to comply with this Court's orders are unavailing and demonstrate a degree of bad faith that is breathtaking. As detailed below, Montgomery has failed to produce a number of documents that eTreppid requested, that this Court ordered produced, and that are identifiably within Montgomery's possession, custody, and control. Montgomery has, in bad faith, refused over and over to comply with this Court's February 21, 2008 order.

Terminal sanctions are appropriate here. eTreppid has incurred significant prejudice as a result of Montgomery's refusal to provide responsive documents. The cut-off for fact discovery is set at August 15, 2008. However, because Montgomery has not provided responsive documents, eTreppid has been unable to even begin to take depositions in this matter. eTreppid has been unable to probe the basis for Montgomery's claims or defenses in any meaningful way. Moreover, Montgomery has demonstrated that lesser sanctions simply will not motivate him to participate meaningfully in the discovery process. Accordingly, eTreppid respectfully submits that this Court should strike Montgomery's answer, counterclaim, and affirmative defenses and enter a default judgment in eTreppid's favor.

II. STATEMENT OF FACTS**A. Montgomery Has Refused to Provide Documents Relating to eTreppid's Technology**

Montgomery first asserts that he has in good faith attempted to comply with this Court's order requiring production of "documents relating to eTreppid's technology, including white papers, powerpoint presentations, marketing documents, and correspondence with potential customers" by

1 providing two hard drives, containing a total of nearly one terabyte of data. Montgomery asserts that
2 he has only been able to provide documents created prior to December 31, 2002, because documents
3 created later than that may contain information subject to the United States Protective Order.

4 As these hard drives were not produced until May 24 and May 27, 2008, eTreppid has not had
5 sufficient time to thoroughly analyze the information contained thereon. eTreppid hopes to be able to
6 provide additional information relating to what is contained on the subject drives before the hearing
7 scheduled for June 10, 2008.

8 eTreppid's initial review of the hard drives that Montgomery produced shows that these hard
9 drives contained dozens of viruses which, if they had been allowed to infect the networks of eTreppid
10 or of eTreppid's counsel, could have caused significant damage to the network. Given the fact that (1)
11 anti-virus software is ubiquitous on modern computers, and (2) Montgomery is a self-styled computer
12 scientist who presumably would have the ability to screen these viruses, the fact that viruses existed on
13 the hard drives delivered by Montgomery is further evidence of the bad faith and gamesmanship with
14 which Montgomery has approached his discovery obligations.

15 Moreover, Montgomery continued assertion that files relative to eTreppid may contain
16 classified information is in marked contrast to the position he took during the Buckthorne Lane
17 proceedings, when he asserted that he did not have any classified information in his possession, and no
18 such information was seized by the FBI. For Montgomery to now claim that he has a good faith belief
19 that every file in his possession which was created from 2003 forward may contain classified
20 information is simply not credible. As such, Montgomery's claim that his discovery efforts have been
21 slowed by a concern for classified information is yet another instance of bad faith.

22 **B. Montgomery Has Refused to Provide Documents Relating to His Attempts to**
23 **License, Sell, Or Distribute Technology**

24 Montgomery asserts that "the only documents even arguably responsive to this request are
25 agreement [sic] between Opspring and Montgomery." Montgomery further asserts that he has
26 produced all such documents. These assertions are both demonstrably false.

27 eTreppid has propounded a number of document requests seeking documents relating to
28 Montgomery's attempts to license, sell or distribute his technology. Specifically:

- eTreppid's first set of Requests for Production, Requests Nos. 30 and 31 seek all documents relating to any attempt on Montgomery's part to sell, license, distribute, or otherwise exchange for value any interest in software or other technology in the fields of data compression, object tracking, pattern recognition, or anomaly detection.
- eTreppid's Second Set of Requests for Production, Request No. 24, seeks all evidence of payments made to Montgomery by Sandoval, Blixseth, Opspring, AziMyth, or Atigeo.
- eTreppid's Second Set of Requests for Production, Request No. 25, seeks all contracts between Montgomery and Sandoval, Blixseth, Opspring, AziMyth, or Atigeo.
- eTreppid's Second Set of Requests for Production, Request No. 26, seeks all correspondence or other communications between Montgomery and Sandoval, Blixseth, Opspring, AziMyth, or Atigeo.
- eTreppid's Second Set of Requests for Production, Request No. 27, seeks all evidence of communications between Montgomery and any customer or potential customer of Opspring or AziMyth.

In this Court's February 21, 2008 Order, the Court specifically ordered Montgomery to provide documents in response all of the above-cited requests. Montgomery's claim that the only responsive documents are agreements between himself and Opspring defies both common sense and the text of eTreppid's document requests. It is clear that Montgomery corresponded with Blixseth via email. Attached hereto has **Exhibit 1** is a copy of an email attached to a pleading filed by Montgomery's former counsel, Michael Flynn. In this email, Blixseth, apparently anticipating the beginning of a media campaign against Mr. Trepp, advises Montgomery that "the ball will start rolling to expose some things about WT that need to come out." It is simply inconceivable that this is the only email exchanged between Blixseth and Montgomery. eTreppid is entitled, by virtue of multiple court orders, to obtain all such emails. Montgomery's failure to produce them is clearly sanctionable.

The Contract between Montgomery and Opspring shows that Opspring agreed to pay Montgomery a salary of \$100,000.00 per month to act as its chief scientist. Surely before entering into an agreement of this magnitude, the parties exchanged emails discussing nature of the technology, the

1 terms of any potential agreement, etc. However, Montgomery has produced virtually no emails
2 between himself and Sandoval, Blixseth, Opspring, or Atigeo. Montgomery has failed to provide any
3 communications between himself and any third parties discussing the technology at issue. Likewise,
4 he has failed to produce any documents evidencing payments that Opspring made to him.

5 Moreover, the documents that Montgomery actually did produce are incomplete on their face.
6 For instance, Montgomery has provided copies of emails exchanged between counsel attaching drafts
7 of agreements. However, Montgomery has not produced the draft agreements referred to in the subject
8 emails. At the show cause hearing, eTreppid will demonstrate several instances in which Montgomery
9 has failed to provide documents that are specifically referred to in the documents which he actually did
10 provide.

11 Montgomery cannot avoid his obligation to produce these documents by disingenuously
12 misinterpreting the requests at issue. eTreppid's document requests and this Court's numerous orders
13 make clear that the scope of documents relating to Montgomery's attempts to sell, license, or distribute
14 the subject technology go far beyond "the agreement [sic] between Opspring and Montgomery."
15 Montgomery's failure to provide documents in response to these requests is not excusable.

16 **C. Montgomery Has Refused to Provide Documents Provided to the Media**

17 Montgomery has on numerous occasions beginning on February 21, 2008, been ordered to
18 provide "documents that the Montgomery Parties provided to the Wall Street Journal, as well as other
19 reporters or media organizations, which discuss or refer to Mr. Trepp, eTreppid, or Jim Gibbons."
20 Montgomery asserts that he has been unable to provide these documents because "as confirmed by the
21 emails produced on May 21 . . . Flynn was the main point person between Montgomery and the
22 media." This assertion is simply not credible.

23 The Court should note that Montgomery does not support this claim with a declaration stating
24 that he did not provide information directly to the news media. Instead, Montgomery's counsel simply
25 makes the unsupported assertion that documents produced on May 21, 2008 show that Flynn was the
26 contact between Montgomery and the media. The first media report of Montgomery's allegations was
27 made in a November 1, 2008 *Wall Street Journal* article authored by John Wilke. This article contains
28 references to several internal eTreppid emails that could have come only from Mr. Montgomery.

1 Accordingly, before November 21, 2006, Montgomery had provided the subject emails to the *Wall*
2 *Street Journal*. However, the first communication between Flynn and any reporter, as shown by
3 Montgomery's May 21, 2008 document production, is November 15, 2008. Accordingly, it appears
4 likely that Montgomery provided the subject emails to reporters before Mr. Flynn had contact with the
5 media. Montgomery's assertion to the contrary is simply not supported by the evidence in this case.

6 In spite of Montgomery's assertion that he cannot ascertain the "universe of eMails provided
7 [to the news media] by Flynn," Montgomery stated, in his Opposition to the present motion, that he
8 "was preparing to produce all emails they believe may have been provided to the media." However,
9 even though Montgomery provided a supplemental production on June 4, 2008 which contains a
10 number of eMails provided to the news media, he has still demonstrably failed to provide all such
11 emails. For instance, the November 1, 2008 *Wall Street Journal* cites an email from a lobbyist stating
12 that "Congressman Gibbons certainly came through for eTreppid!" Montgomery has not provided a
13 copy of this email.

14 More troubling, Montgomery stated, in his opposition to the present motion, that he intended to
15 produce a copy of the Len Gloguaer email, in the native PST format, on June 5. As of the date of the
16 present motion, Montgomery has still failed to provide this document. As this Court knows, eTreppid
17 has raised significant concerns regarding the authenticity of this email. eTreppid needs the original
18 email, in the native format, to further investigate these concerns. Montgomery's continuing refusal to
19 provide this document is precluding this investigation.

20 Finally, this Court should note that even though eTreppid specifically requested that all emails
21 provided to the media be provided in native format, Montgomery has only provided printed copies of
22 the emails. Thus, even though Montgomery has been able to locate and provide nearly one terabyte
23 worth of electronic files, he has refused to provide the emails provided to the media in their native
24 format.

25 Accordingly, Montgomery has failed to comply with this Court's numerous orders requiring
26 the production of documents provided to the news media.

D. Montgomery Has Refused to Provide Photocopies of CDs Seized by the FBI and Later Returned to Montgomery

This Court ordered Montgomery in February to provide photocopies of the faces of all CDs that the FBI seized and later returned to him, he now claims – for the first time – that he cannot do so because “at the time the CDs were returned, Montgomery did not segregate the returned items, but merely intermingled the returned CDs with others in his possession.” Montgomery further claims that, of the CDs he can identify, he believes in good faith that many disclose information within the ambit of the protective order.”

Montgomery cannot, in good faith, claim that he has lost track of the CDs seized by the FBI and later returned to him. Before the CD’s were returned, eTreppid specifically requested that the Court order that a forensic copy of all CDs and hard drives be made in order to prevent Montgomery from destroying this evidence. The Court did not order that such a forensic copy be made, but the Court ordered that the scope of the February 8, 2006 Preliminary Injunction, would be expanded to enjoin Montgomery from “destroying, modifying, duplicating, distributing, disseminating, hypothecating, transferring, licensing or assigning” the materials that were seized by the FBI and returned to Montgomery. (Doc. No. 146, 34:20 to 35:5). Thus, despite this Court’s previous order requiring Montgomery to maintain all materials seized by the FBI and subsequently returned to him, Montgomery now claims that he is unable to locate these CDs. Thus, Montgomery has violated both this Court’s Order requiring production of documents and the previous order requiring that he maintain all materials that the FBI returned to him.

Montgomery also cannot honestly claim that he has a good faith belief that a number of the CDs returned to him have information written on their face which may be classified. On Thursday, June 5, 2008, eTreppid obtained a copy of photographs taken by the FBI of items returned to Montgomery.¹ These photographs include photos of the individual CDs that were returned to Montgomery. By way of example, the FBI photographs that CDs, bearing the following labels *inter*

¹ These photographs are being numbered for production and will be produced to all parties prior to the June 10, 2008 hearing.

1 *alia*, were returned to Montgomery:

- 2 • eTreppid, Gianna Documents, 06/02/02.
- 3 • eTreppid, Michael, 2/14/01
- 4 • 3 CDs, labeled attorney client privileged, identified as containing voice messages from
- 5 12/03 – 7/04.
- 6 • A CD labeled DEO Warren Old Email.

7 There are dozens of additional CDs that bear labels that cannot possibly contain confidential
8 information. None of these CD's – or even copies of the faces of these CDs – have been produced by
9 Mr. Montgomery. He cannot possibly believe that the information contained on the face of these CDs
10 has could be subject to the Untied States Protective Order. Instead, Montgomery's refusal to produce
11 even copies of the faces of these CDs appears to be a calculated attempt to prevent eTreppid from
12 discovering, for instance, the contents of the "Warren Old Email" CD.

13 Moreover, in the course of the proceedings related to the FBI's search of his residence at
14 Buckthorne Lane, Montgomery asserted, repeatedly and vigorously, that the information taken by the
15 FBI was not classified. Montgomery's assertion that he now has developed a good faith belief that the
16 subject information may be classified is simply dishonest.

17 Accordingly, Montgomery has both failed to maintain evidence, disregarding this Court's
18 specific orders to the contrary, and he has refused to provide evidence that this Court ordered him to
19 produce. Montgomery has no cognizable excuse for his refusal to provide this information.

20 **III. ARGUMENT**

21 Terminal sanctions are appropriate in this case. Montgomery has persistently, and in bad faith,
22 refused to comply with this Court's orders. The discovery cut-off, which is set for August 15, 2008, is
23 rapidly approaching, and because of Montgomery's refusal to provide responsive documents, eTreppid
24 has been unable to adequately prepare for trial. Moreover, Montgomery's refusal to produce
25 documents such as the "Warren's Old Email" CD and the Len Gloguaer email, demonstrate "a pattern
26 of deception" that renders it impossible for eTreppid to prepare for trial. Accordingly, terminal
27 sanctions are appropriate.

28 The case law cited by Montgomery supports a finding that terminal sanctions are appropriate.

1 The factors set forth in *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) all favor
2 dismissal. As Montgomery points out, the most decisive of these factors are (1) the risk of prejudice to
3 the party seeking production, and (2) the availability of less drastic sanctions.

4 Here, Montgomery's refusal to provide responsive documents threatens to interfere with the
5 rightful decision of the case. Montgomery has refused for several months to provide documents that
6 eTreppid must have to investigate the viability of its claims and defenses in this matter, as well as
7 those of Montgomery. For example:

- 8 • It appears, based on documents that Montgomery has produced in this case, that he violated
9 the preliminary injunction by licensing eTreppid technology to Opspring within weeks of
10 the date upon which the preliminary injunction was entered. However, Montgomery has
11 refused to provide correspondence between himself and Blixseth, Sandoval, or other agents
12 of Opspring which may shed light on this fact.
- 13 • As eTreppid has pointed out, it appears that Montgomery has placed a forged email into
14 evidence. However, Montgomery has refused to provide the original, native format PST
15 files of the Glogauer email which will allow eTreppid to investigate this claim more
16 thoroughly.
- 17 • Although Montgomery has long been in possession of documents that clearly belong to
18 eTreppid, such as the "Warren Old eMail" CD, he has refused to provide this. As a result,
19 eTreppid has been unable to examine Montgomery's correspondence to determine whether
20 it supports eTreppid's claims in this matter.

21 Because Montgomery's failure and refusal to provide these crucial documents has operated to
22 prevent eTreppid from going forward with its preparation of this case for trial, terminal sanctions are
23 appropriate. *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).
24 Moreover, because Montgomery's refusal to provide these documents demonstrates a tremendous
25 degree of bad faith on his part, this refusal creates a "pattern of deception" likewise warranting
26 dismissal. *Id.*

27 Moreover, it is clear that lesser sanctions will not be effective to compel Montgomery to
28 produce the subject documents. This Court has already ordered Montgomery to pay sanctions in the

form of attorney's fees on two occasions. Nonetheless, Montgomery has again refused to produce the documents that he was ordered to provide. Accordingly, eTreppid respectfully submits that this Court should prevent further discovery abuses by dismissing Montgomery's complaint and by striking his answer to eTreppid's counterclaims.

Dated: April 11, 2008.

/s/

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PROOF OF SERVICE

I, Cynthia L. Kelb, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action. I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection of mail, delivery of its hand-deliveries and their process of faxes.

On June 6, 2008, I caused the foregoing **REPLY IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE** to be:

X filed electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct, and that this declaration was executed on June 6, 2008.

3 _____/s/
4 Cynthia L. Kelb
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EXHIBIT “1”

EXHIBIT “1”

Carla DiMare

From: mjfbb Flynn [mjfbb@msn.com]
Sent: Tuesday, July 11, 2006 7:29 PM
To: Carla DiMare
Subject: Fw: revised idea
Follow Up Flag: Follow up
Flag Status: Red

----- Original Message -----

From: Dennis Montgomery
To: mjfbb Flynn
Sent: Tuesday, July 11, 2006 7:00 PM
Subject: FW: revised idea

From: LearC2@aol.com [mailto:LearC2@aol.com]
Sent: Tuesday, July 11, 2006 5:43 PM
To: michael@azimyth.com; Dennis Montgomery
Subject: Re: revised idea

In a message dated 7/11/06 5:33:32 PM, michael@azimyth.com writes:

You've got friends who have your back!!!

Dennis - Warren is a bully. We haven't pulled out all the cards yet. If he feels it slipping now, just wait a week or so. I have a plan that I have sort of talked to with Michael. If you can do one thing for us, try to believe and not worry. There are some things in life that you can't rush. Timing and patience will win, trust me. Once we have the meetings next week, I the ball will start rolling to expose some things about WT that need to come out. His focus will no longer be on you, it will be on his very own ass. Believe. Edra

This message and any attached documents may be confidential, privileged or both. If you are not the intended recipient, you are not authorized to open, read, copy, store, distribute or use this information in any way. Failure to comply with this notice may be a violation of applicable laws concerning the receipt of electronic mail. If you have received this transmission in error, please notify the sender immediately by replying to this e-mail and then delete this message. Thank you.